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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 13 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Chinese style food. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is November 28, 1995. The proffered wage as stated on the Form ETA 750 is \$2,350.00 per month, which amounts to \$28,200.00 annually.

The I-140 petition was submitted on August 2, 2001. On the petition, the petitioner claimed to have been established on April 30, 1971, to currently have 31 employees, to have a gross annual income of \$1,132,286.00 in 1999, and to have a net annual income of \$30,046.00 in 1999. The petition is for a substituted beneficiary. With the petition, the petitioner submitted a Form ETA 750 for the substituted beneficiary. On that Form ETA 750B, signed by the beneficiary on June 29, 2000, the beneficiary did not claim to have worked for the petitioner. With the petition, the petitioner also submitted supporting evidence.

In a request for evidence (RFE) dated January 7, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In a memorandum dated January 7, 2002 to the CIS Anti-Fraud Unit at the American consulate in Guangzhou, China, the director requested an investigation of the beneficiary's claimed work experience. A copy of that memorandum is now found on the non-record side of the file.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on March 29, 2002.

In a memorandum dated September 11, 2003, the Officer-in-Charge, American Consulate, Guangzhou, China, reported on the findings of the Anti-Fraud Unit's investigator concerning the beneficiary's experience. The investigator found nothing suspicious in the documentation certifying the beneficiary's work experience.

In a second RFE, dated January 9, 2004, the director again requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director requested evidence of this ability either in the form of copies of annual reports, copies of completed and signed federal tax returns, or audited financial statements. The director requested that evidence for the years 2001 to the present.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the second RFE were received by CIS on March 24, 2004.

In a decision dated March 31, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits no brief and no additional evidence.

Counsel states on appeal that the director considered only the petitioner's net income and net current assets as shown on its tax returns, but failed to consider the petitioner's cash on hand as shown on Schedule L, line 1, attached to each of the petitioner's federal tax returns. Counsel states that the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), requires the director to account for all relevant factors, not merely one or two factors.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on June 29, 2000, the beneficiary did not claim to

have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The record contains copies of Form 1120 U.S. Corporation Income Tax Returns for 1995, 1996, 1997, 1998, 1999 and 2000 in the name [REDACTED]. The employer identification number on those returns ends with the three digits 698, and it matches the IRS tax number stated on the I-140 petition. This information is sufficient to establish that the legal corporate name of the petitioner, [REDACTED] restaurant, is [REDACTED].

The last tax return in the record of [REDACTED] is the Form 1120 for the year 2000. That return is not marked as a final return and the Schedule L balance sheet attached to that return shows that the corporation had significant assets and significant liabilities as of the end of the year. Those facts indicate that the corporation [REDACTED] continued to function for at least some period in the following year of 2001, and perhaps beyond 2001. No final return of [REDACTED] is in the record.

The record also contains copies of Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002 under a different corporate name. The first line of the address block on those forms is the corporate name GTL Investment Group, Inc., and the second line of the address block on those forms is the business name Golden Dragon Restaurant. The employer identification number ends with the three digits 065, a different number than the employer identification number of Golden Dragon, Inc. The foregoing information establishes that GTL Investment Group, Inc., is a separate corporate entity from Golden Dragon, Inc. Both corporations, however, show the same street address on their tax returns.

The record does not contain evidence explaining the relationship between the corporation Golden Dragon, Inc. and the corporation GTL Investment Group, Inc.

In the instant petition, both the ETA 750 application and the I-140 petition were filed under the business name Golden Dragon Restaurant. The legal corporate name of the petitioner was not stated on either the ETA 750 or on the I-140 petition. Concerning the ETA 750, which was filed on November 28, 1995, the evidence is sufficient to establish that the petitioner's corporate identity at the time was Golden Dragon, Inc., the name which appears on the Form 1120 U.S. Corporation Income Tax Returns for 1995 through 2000.

Concerning the I-140 petition, which was filed on August 2, 2001, the evidence also establishes that the petitioner's corporate identity on that date was still Golden Dragon, Inc. As noted above, the IRS tax number on

the I-140 petition is the same as the employer identification number on the Form 1120 tax returns of Golden Dragon, Inc., a number ending in the three digits 698.

Although the record lacks a copy of a tax return of Golden Dragon, Inc., for the year 2001, that corporation was apparently still functioning for at least a part of 2001. As noted above, the tax return for 2000 of Golden Dragon, Inc., was not marked as a final return, and the Schedule L attached to that return showed significant year-end assets and significant year-end liabilities.

The record also lacks a copy of a tax return of Golden Dragon, Inc., for the year 2002. The record before the director closed on March 24, 2004 with the petitioner's submissions in response to the second RFE. As of that date, the returns of Golden Dragon, Inc., for 2001 and for 2002 should have been available, but copies of those returns were not submitted for the record.

The first tax return in the record of GTL Investment Group, Inc., is the Form 1120S for the year 2001. That return states that the effective date of the corporation's election as an S corporation was January 3, 2001. The Schedule L balance sheet attached to that return shows that at the beginning of the year 2001 that corporation had zero assets and zero liabilities. The Schedule L for 2001 shows significant assets and liabilities at the end of the year 2001. The evidence establishes that GTL Investment Group, Inc., continued in operation through at least 2002. Its end-of-year assets and liabilities for 2001 match those at the beginning of 2002 as shown on the Schedule L attached to its Form 1120S for 2002. Moreover, the Schedule L for 2002 shows significant assets and liabilities at the end of 2002.

The record contains no evidence that GTL Investment Group, Inc., qualifies as a successor-in-interest to Golden Dragon, Inc. That status requires documentary evidence that the successor has assumed all of the rights, duties, and obligations of the predecessor company. The fact that a corporation is doing business at the same location as a predecessor does not establish that the second corporation is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Since the record lacks copies of income tax returns for 2001 and 2002 of the petitioner, Golden Dragon, Inc., the tax return evidence fails to establish the petitioner's ability to pay the proffered wage in those years. The information on the petitioner's tax returns for 1995 through 2000 is analyzed below.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

The petitioner's tax returns state amounts for net income as shown in the table below, reflecting the figures for taxable income on line 28 of its Form 1120 returns for 1995 through 2000.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1995	\$16,218.00	\$28,200.00*	-\$11,982.00
1996	-\$47,221.00	\$28,200.00*	-\$75,421.00
1997	-\$137,490.00	\$28,200.00*	-\$165,690.00
1998	-\$111,333.00	\$28,200.00*	-\$139,533.00
1999	\$30,046.00	\$28,200.00*	\$1,846.00
2000	-\$79,222.00	\$28,200.00*	-\$107,422.00
2001	not submitted	\$28,200.00*	no information
2002	not submitted	\$28,200.00*	no information

* The full proffered wage, since the record contains no evidence of any wage payments by the petitioner to the beneficiary.

Only in 1999 was the petitioner's net income greater than the proffered wage. For each of the other years for which the petitioner's tax returns were submitted, the petitioner's net income was less than the proffered wage.

With regard to the tax returns in the record of GTL Investment Group, Inc., each of the Form 1120S tax returns in the record state that the effective date of the corporation's election as an S corporation was January 3, 2001. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K.

In the instant petition, the Schedule K's attached to the Form 1120S tax returns of GTL Investment Group, Inc., show no income from sources other than from a trade or business. Therefore the corporation's net income will be considered to be its figures for ordinary income.

The tax returns of GTL Investment Group, Inc., state amounts for net income as shown in the table below, reflecting the figures for ordinary income on line 21 of its Form 1120S returns for 2001 and 2002.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$4,298.00	\$28,200.00*	-\$32,498.00
2002	-\$75,118.00	\$28,200.00*	-\$103,318.00

* The full proffered wage, since the record contains no evidence of any wage payments by the petitioner to the beneficiary.

The above figures fail to establish the ability of GTL Investment Group, Inc., to pay the proffered wage in 2001 or in 2002. Therefore, even if the evidence established that GTL Investment Group, Inc., was a successor in interest of the petitioner, the net income of GTL Investment Group, Inc., fails to establish the ability of GTL Investment Group, Inc., to pay the proffered wage for 2001 and 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
1995	-\$53,316.00	-\$30,175.00	\$28,200.00*
1996	-\$30,175.00	-\$24,655.00	\$28,200.00*
1997	-\$24,655.00	-\$22,975.00	\$28,200.00*
1998	-\$22,975.00	\$60,728.00	\$28,200.00*
1999	\$60,728.00	\$95,387.00	\$28,200.00*
2000	\$95,387.00	\$20,786.00	\$28,200.00*
2001	not submitted	not submitted	\$28,200.00*
2002	not submitted	not submitted	\$28,200.00*

* The full proffered wage, since the record contains no evidence of any wage payments by the petitioner to the beneficiary.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in the years 1995, 1996, 1997 and 2000, based on net current assets at the end of each year.

Calculations based on the Schedule L's attached to the tax returns of GTL Investment Group, Inc., yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	\$0.00	\$58,811.00	\$28,200.00*
2002	\$58,811.00	\$75,118.00	\$28,200.00*

* The full proffered wage, since the record contains no evidence of any wage payments by the petitioner to the beneficiary.

Based on the end-of-year figures, the foregoing information would be sufficient to establish the ability of GTL Investment Group, Inc., to pay the proffered wage in 2001 and 2002. Nonetheless, as discussed above, the evidence fails to establish that GTL Investment Group, Inc., is a successor in interest to the petitioner.

The record contains no financial evidence other than the tax returns discussed above.

Counsel asserts that the petitioner failed to consider the petitioner's cash on hand as shown on line 1 of the Schedule L balance sheets in the record. However, cash on hand is not an adequate measure of a petitioner's ability to pay the proffered wage, since cash will be subject to any liabilities of the petitioner. Cash is one of the items included in an analysis of the petitioner's net current assets, and therefore the petitioner's cash assets as shown on its Schedule L balance sheets are fully considered in the analysis above.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that the period from 1995 through 2002 was an uncharacteristically unprofitable period for the petitioner.

In his decision, the director correctly summarized the information on the tax returns in the record with regard to net income and net current assets. The director failed to note that the returns in the record for 2001 and 2002 were for a different corporation than the petitioner, and the director therefore failed to consider whether that corporation was a successor in interest to the petitioner. Nonetheless, those errors did not affect the director's decision to deny the petition, since, as discussed above, the record fails to establish that the corporation for which tax returns for 2001 and 2002 were submitted, GTL Investment Group, Inc., is a successor in interest to the petitioner.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

Beyond the decision of the director, CIS electronic records indicate that the petitioner has filed one other I-140 petition¹ which has been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2).

¹ WAC-99-222-50178.

CIS electronic records show that the other petition submitted by the petitioner was approved on October 25, 2001. The record in the instant case contains no information about the proffered wage for the beneficiary of that petition, about the current immigration status of that beneficiary, whether that beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to that beneficiary. Furthermore, no information is provided about the current employment status of that beneficiary, the date of any hiring and any current wages of that beneficiary.

Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner.

In summary, the evidence in the instant case fails to establish the ability of either the petitioner or of GTL Investment Group, Inc., to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and the record also fails to establish that GTL Investment Group, Inc., is a successor in interest to the petitioner.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.